ADULT PROBATION

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The lay mind is so far unfamiliar with the essence of the probation system, and indeed those dealing with the subject at close range often show such a disagreement, if not ignorance, as to its basic principles, that it may be well, in attempting to gain a helpful conception of those principles, to restate a few definitions of probation.

Probation is a judicial system by which an offender against penal law, instead of being punished by a sentence, is given an opportunity to reform himself under supervision and subject to conditions imposed by the court, with the end in view that if he shows evidence of being reformed, no penalty for his offense will be imposed.

Or, probation is the suspension of final judgment in a given case, permitting the offender to have a chance to overcome his weakness or mistake by coöperating with the state through its probation officers. Its method is that of overcoming evil with good.

Or, probation is the conditional forgiveness by society, acting through its judicial officers, of an offender against its penal laws, based upon a reasonable expectation that, if forgiven, he will not again offend; and intended to take effect upon evidence that this expectation has been fulfilled.

The last definition probably is closest to the technical and historical aspects of the system. Legal practice has not yet arrived at the stage of compelling an offender to accept probation. And the almost universal practice at the end of a satisfactory probation period is to dismiss the case, or make a practically equivalent disposition by filing. Neither of these aspects is consistent with a fourth definition sometimes attempted—"a reformatory without walls."

The probation system originated in the practice of the judges of many Massachusetts courts, notably those of the inferior courts in and about Boston, of continuing cases from time to time, after a determination of guilt, and upon satisfactory proof of good behavior

of dismissing the case. Here is the germ of the theory that in certain cases society, by being kind to the defendant, is kind to itself. In a state where a maximum and minimum penalty, itself a rudimentary form of individualized punishment, had become the rule rather than the exception, this judicial practice marked the next step in the evolutionary process. It seems probable that the chief conscious motive was a desire to relax the rigors of the old system of punishment for crime. Reformation, as an end in itself, was in the background. The theory evidently was that society might well forego the entire penalty at times. And apparently society readily adopted the practice, whatever its realization of the theory. In 1878, the mayor of Boston was authorized to appoint a probation officer for Suffolk County, to be under the charge of the chief of police, and whose duty it should be to recommend to the courts of Suffolk County "the placing on probation of such persons as may reasonably be expected to be reformed without punishment." In 1880, this method was made state-wide. In 1891, the law took substantially its present shape, by which probation officers are judicially appointed throughout the state, and become to all intents and purposes agents of the courts. It is significant that all these laws provided only that courts might appoint probation officers, and might place offenders "upon probation." What that term meant in criminal law, what consequences it entailed, were still left for judicial evolution. And such has been the general course of later legislation in other states. In truth, probation is but one aspect of the evolution and growth of the system of individualized punishment.

The history of probation shows that there can be no essential and basic difference between adult and juvenile probation, for probation, in practice, though not legislatively, antedated juvenile courts and juvenile delinquency statutes. The topical division is in some ways unfortunate, as creating the impression of a difference in kind. The difference is only in degrees and methods resulting from the greater plasticity of the material for probation found in juvenile courts, and the more intensive treatment permitted by society because of the greater prospect of ultimate reclamation for society's welfare.

The space limits of this article obviously preclude any detailed description of the practice of probation, but attention cannot be centered too often upon its three cardinal principles, the selection

of only the fit for probation, the choice of properly qualified probation officers, and the need of judicious, unremitting supervision during the term of probation.

Probation is no panacea for crime. It has its definite niche in criminal practice, and any attempts to extend it beyond its proper sphere must result unfavorably. A proper selection of cases for probation should, in the writer's opinion, follow this rule: that the case should, after thorough investigation of the antecedents, environment, temperament and habits of the defendant, disclose a tendency to anti-social ways susceptible of reformation, more reformable outside than inside prison walls, conformably with public opinion, and consistently with public safety. This excludes in most cases the casual offender. A man of previous good conduct, who, under great provocation, assaults another, a woman of previous good repute, who under a sudden temptation, steals in a department store (an offense in which recidivism is exceedingly small), these are not usually cases requiring probationary treatment. What the humiliation of arrest and consequent appearance in court cannot accomplish in such cases, probation is not likely to accomplish. The prompt termination of the case by a moderate penalty or none at all is enough in such cases, because the probability of relapse is negligible. At the other extreme lie cases of chronic offenders, for whom probation may be a brief restraint, but whose real reform is largely improbable. It is all too common for courts to grant probation for purposes of temporary restraint alone, and the practice tends to the disrepute of the probation system. Underlying the probation system, just as in all penal measures, is the community instinct of self-preservation, and when the endeavor for persistent reform becomes disproportionately expensive when compared with results, the basis for further effort vanishes.

Legislation which limits probation to certain offenses is also illogical; and attempts to classify probation results by crimes rather than by persons are misleading. It is the habit or tendency which should be sought for, and the particular crime is of consequence only in so far as its nature denotes such tendency. The anti-social tendency plus a prospect of reform are the bases for probation.

As to fitness of officers, a somewhat extended experience in selection in a large city court has satisfied the writer that suitable candidates are an extremely rare commodity, and that a proper

selection of probation officers is as important as the selection of the judge himself. Their qualifications have been thus described. "The ideal probation officer should possess sound judgment, tact, patience and zeal in the work, the ability to read human nature, sufficient adaptability to appreciate and make due allowance for varying results of temperament, history and environment. He should be one who knows how to lead rather than drive, but who can drive effectually if need be. He should understand the influences that determine human character and conduct for good and ill, as well as methods of moulding character and how to apply them. And above all, he should have a love for the work."[1] It is obvious that these qualifications cannot be had for the pittance which many states pay probation officers, yet an unsuitable officer is a poor investment for any community. Appointment is generally a function of the court. The importance of temperament and personality renders ordinary civil service methods of selection of doubtful value. In view of the growing importance of the probation system, it would seem advisable to inaugurate a method of preliminary training and examination, under the auspices of some specially qualified board, such as the probation commissions of Massachusetts and New York, and to give such board, if not the power of final selection, at least that of certification.

The urban court, if constructed according to the modern ideas of comprehensive unity, has the great advantage in the matter of selection of officers that the force may be made mutually supplementive. For instance, in the municipal court of Boston, the appointees, in addition to the majority of persons of common business experience, include appointments from the police force, several members of the bar, and an officer trained in parole work; and the public is now watching with interest the experiment of adding a physician who is also a specialist in psychology. The different lines of approach to the problems of probation which such a force brings with it result in discussions which cannot fail to prove mutually helpful, and to avoid stereotyped methods. A responsible department head, with large power, is an essential to best results.

In adequate supervision of persons on probation lies the very heart of the system, yet it is the part which is all too apt to be crowded

[1] Report of Committee on Adult Probation in *American Institute of Criminal Law and Criminology Journal*, vol. 1, no. 3.

into the background by the more insistent claims of preliminary investigation, court attendance and office duties. A division of the force may sometimes secure more adequate field work. Constant contact with the probationer is indispensable. This part of the probation system is so important as to warrant quoting at some length a summary of the directions in which the probation officer should exert himself:

> During probation, constant, judicious and helpful supervision, not reaching the stage of undue annoyance, is imperative. This involves a constant study of the probationer and his environment, and the enlisting of all agencies, social, charitable, religious and industrial, which can aid in the work of reform. The officer should help his charge to obtain suitable employment, to live under proper conditions, to associate with desirable companions, and avoid harmful influences. The officer should strive to gain the probationer's confidence and respect and at the same time to impress upon his mind that the relation must be mutual.
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> He should not be content with aiding him to hold in check his criminal or evil proclivities during the time of his probation—proclivities which if still existent are liable to break out again as soon as he has escaped sentence —but should endeavor to help him to really reform himself. To this end the officer should endeavor to stimulate the probationer's dormant energies for a morally healthful and useful life; develop in him ideas of right living, duty and sobriety, and ambitions along desirable and laudable channels; change those impulses, points of views and attitudes toward life and society which are wrong; develop new mental habits in place of old ones; stimulate his confidence in his own capacity to control himself and to succeed in a new and useful life. The re-awakening of will power is an object of importance, inducing the probationer to depend rather upon his own effort and initiative than upon the officer. In sum and substance the officer should endeavor to build up a new character in the offender; to replace the perverted ideas, impulses and habits which he has acquired through his environment with a new stock, *i.e.*, to reëducate him along lines which determine conduct.[2]

Not over fifty cases per officer at a time is an ideal condition seldom realized in actual practice. It is partly a taxpayer's question, yet when to the actual earnings of probationers is added the excess cost of prison maintenance over production which is saved, the public can well afford to pay the much less cost of an adequate probation force. Publicity of actual figures along this line is to be desired.

Closely linked with the question of supervision is that of surrender, too often regarded by the probation officer as a confession

[2] Report of Committee on Adult Probation, *supra*.

of failure. Nothing could be more erroneous than the custom of gauging the probation work of a court by the number of surrendered cases, and assuming that the one showing the smallest proportion of such cases is doing the best probation work. Exactly the opposite is usually true. Few surrenders denote either an under-use of probation, or, more frequently, supervision so lax as to be valueless. Correct data of recidivism after discharge from probation would furnish a surer test.

The spread of judicial probation has been great in point of legislation, it having been authorized in forty-two states and the District of Columbia. In actual practice, Massachusetts is probably the only state in which all authorized courts employ the system. Within a year or two, half of the counties in the state of New York had yet to put it in practice, and in many states it is little more than a name. And yet its growth in practice has been constant, and each year marks its use by a larger number of courts.

It is a matter of constant regret to the friends of the probation system that actual information about its practical workings is so meager and unobtainable. The system has passed the empirical and entered upon the scientific stage, and it is in danger of halting for want of sufficient data to make its future progress sure. Rule-of-thumb methods have bred diversity and anomaly. Their removal can be brought about only by intensive study and scientific deduction, a study of facts, and the facts in adequate detail and quantity are wanting. Legislation for compulsory reports in this, as in other matters of judicial work, is one of the needs of the hour.

One of the conspicuous dangers to the probation system is the habit of making it the dumping ground of measures, remedial or beneficial in themselves, but whose purpose is foreign, if not antagonistic, to the theory of probation. Massachusetts furnishes examples of such blunders. The first probation law required that probation officers should inform the court whether a defendant had been previously convicted. This has the advantage, more imaginary than real, of giving the probation officer a consecutive knowledge of the case. It has the much greater disadvantages, and actual ones, of encouraging in the probation officer, whose instincts should be those of a good Samaritan, the very opposite ones of a detective, and of identifying the probation officer too closely with the prosecution in the mind of the defendant, a very inauspicious

beginning for real reclamation service. This work of investigation is really vicarious work of the court itself, the selective process that precedes the granting of probation, the gathering together of the good and the bad in the defendant's make-up, a function not wisely left to the possibly one-sided scrutiny of the prosecution alone. It would be a boon to probation if it could be done by a distinct agency of the court. Another perversion of the functions of the probation officer is in the collection of suspended fines. The Massachusetts law directs that the fine shall be suspended and the defendant shall be placed on probation. The theory is still collection, but collection by delayed payment, a mere detail of method. The time and energies of a really good probation officer are too valuable to be spent in performing the duties of a mere collector. The argument that "supervision can do no harm" hardly touches the case; very likely a goodly percentage of the entire population might profit by sagacious oversight. This collection work would also better be entrusted to some other agency of the court. The sooner such anomalies are sundered from the practice of probation, the better for the probation system. They have served their purpose as temporary makeshifts, and their further retention is justifiable only in courts where the volume of business precludes a proper division of labor. What is here said of course does not apply in the relatively rare case in which the payment is purposely and wisely made a part of reformative treatment.

The future seems to promise for probation one of two very dissimilar courses, either its retention as part of the judicial structure and machinery, or an expansion of the Wisconsin method of transfer of all cases on probation to a central agency, independent of the courts. There may be predicted, as an early sequence of the adoption of the latter course, a limitation of the judicial function to the mere determination of guilt, transferring to another authority the dispensing of retributive measures, or their suspension for reformative purposes. The system of judicial probation demands for its preservation that there be secured a better appreciation of the justifiable limits of the probation system, more uniformity of application, more cohesion between the various steps of reformative treatment, less of the variations born of the present myopic mania for creating isolated specializing courts, which from their very isolation breed antagonisms of theory and practice, and the

creation of which runs counter to the modern ideas of court unity. The benefits of specialization, which can be retained by divisional courts, are now more than offset by the dangers of autonomy.

The Wisconsin method is a half-way measure. It makes for uniformity of treatment, probably also for economy; but it has the very serious defect of divorcing the judges, upon whom still rest the duties of selection for probation and sentence on surrender, from the means of that intimate knowledge of reformative methods and results which is indispensable to a proper use of the selective process. It may be that it marks an evolutionary step toward the creation of a sentencing board, and there are even now surface indications in Massachusetts of the rapid growth of that idea. Of course such a plan looks not only to the removal of variations in the granting of probation, but also to the lack of uniformity, and sometimes of sound judgment, in actual and final sentences. Indeed, the latter is probably the more urgent reason for the proposed measure. The adoption of such a plan of course means the end of probation as a judicial function.

The writer is yet to be convinced of the wisdom of such a radical change. Even in so small a state as Massachusetts, the number of cases which would pass annually under control of a sentencing board could not be less than 100,000, probably many more. This would inevitably require much subdivision of labor with a consequent tendency to variation and abuse hardly less than the present system discloses. Such a board would also lose in large measure what is often one of the best means of determining disposition, the story of the crime as disclosed at the trial. A wider grant of power to state probation commissions, a more efficacious method of disseminating among judges information of reformative methods employed both in probation and in penal treatment, and above all, the closer approach to uniformity which is a necessary sequence of the present movement toward a greater unification of the judicial system—these would seem to promise the safer correctives for the present shortcomings in the practice of probation. The lack of uniformity in present sentences can be adequately met by giving prison commissioners a wider power of revision of sentences.